

NTSB Order No. EA-4426

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of February, 1996

GARY L. SWAFFORD and)
GARY L. COLEMAN,)
)
Applicants,)
)
v.)
) Dockets 199-EAJA-SE-11803
DAVID R. HINSON,) 200-EAJA-SE-11804
Administrator,)
Federal Aviation Administration,)
)
Respondent.)
)
)

Applicants (respondents below) appeal the law judge's denial of their Equal Access to Justice Act¹ applications. The law judge held that no EAJA fees could be recovered because the applicants were not prevailing parties, a condition precedent under the statute. Although we do not adopt the law judge's

analysis, we affirm his decision that the EAJA applications should be denied, for the reasons that follow.

The EAJA requires the government to pay to a prevailing party certain attorney fees and costs, unless the government establishes that its position was substantially justified, or that special circumstances would make an award of fees unjust.

5 U.S.C. § 504(a)(1). As the law judge notes in his decision, a party need not prevail as to every issue in order to receive an award of fees and expenses. Partial awards are contemplated under EAJA. Application of Carter, NTSB Order EA-3959 at 6 (1993), and cases cited therein. Applicants need only show that they have won "a significant and discrete substantive portion of the proceeding." 49 C.F.R. § 826.5(a). Once that burden has been met, the Administrator must show that he was substantially justified in his position in order to avoid an award.²

In the underlying proceeding, Administrator v. Swafford and Coleman, NTSB Order EA-4117 (1994), the respondents were charged with three violations of the FAR (Federal Aviation Regulations),

²In deciding whether the Administrator was substantially justified, the relevant inquiry is whether the government's case is "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). "To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." Application of U.S. Jet, NTSB Order EA-3817 at 2 (1993). The legislative history of the EAJA makes clear that it was "intended to caution agencies to carefully evaluate their case and not pursue those which are weak or tenuous." See Administrator v. Catskill Airways, 4 NTSB 799, 800 (1983), quoting 5 U.S. Cong. News 1980, at 4993.

as a result of their failure to comply with an ATC (air traffic control) instruction. The Administrator alleged and proved that ATC had clearly and unambiguously instructed respondents to cross taxiway charlie and hold short of taxiway bravo. Respondents, we found, carelessly read back the instruction -- it was not a verbatim readback and it did not even include the runway designator. (The law judge termed the readback "nonsensical.")

The air traffic controller working ground control nevertheless handed off the aircraft to the local controller, claiming that he heard nothing which led him to believe that respondents misunderstood his instruction. Respondents subsequently taxied across an active runway and took off in front of an aircraft that they were supposed to have followed.

Respondents denied the allegations and claimed that, having read back the ATC instruction, it was then ATC's duty to listen and insure that the readback was correct. Had ATC fulfilled its responsibilities, respondents argued, the error would have been caught before the FAR violations occurred, and the violations would have been prevented. The law judge agreed and dismissed the complaints. The Board reversed the law judge's decision and affirmed the Administrator's allegations of FAR violations. However, in light of ATC's failure to detect and correct confusion evident in the readback, we decided that the suspension of respondents' airman certificates was not warranted.

The issue before the law judge in the instant EAJA proceeding was whether the applicants partially prevailed for

EAJA purposes where the sanction had been waived, even though the FAR violations had been sustained. As the law judge notes in his thorough analysis, the Board has addressed but never decided this precise issue. In Gull v. Administrator, NTSB Order EA-3521 at 3 (1992), the Administrator withdrew all but two allegations of FAR violations prior to the hearing. The law judge affirmed only one violation and reduced the suspension from 45 to 15 days. On appeal of the law judge's grant of an EAJA award, the Administrator did not pursue the issue of whether the applicant was properly found to be a prevailing party. Thus, the Board's citation to a decision in which the term "prevailing party" was defined as requiring that the final result represent "in a real sense a disposition that furthers [a fee claimant's] interest," citing National Coalition Against Misuse of Pesticides v. EPA, 828 F.2d 42, 44 (D.C. Cir. 1987), was mere dicta.

In Gilfoil v. Administrator, NTSB Order EA-3982 (1993), the Administrator had issued an emergency revocation order on charges that the respondent had failed to follow cockpit check procedures and carelessly operated an aircraft. The respondent never disputed the facts alleged, but contested the nature of the sanction. The Administrator prevailed on the allegations but the law judge reduced the sanction from revocation to a 90-day suspension. In a subsequent EAJA appeal, the issue of whether the respondent "prevailed" was not squarely before the Board because the Administrator failed to offer argument on the issue.

Nonetheless, the Board found that this case was "not a case of

simple sanction reduction, but a proceeding in which the argument was between revocation and suspension....Consequently, the litigation is fairly understood as litigation over sanction, and in this contest applicant clearly prevailed." NTSB Order EA-3982 at 4.³ No such contest was presented in this proceeding.

While applicants may have received a tangible benefit because of the outcome of this case, they failed to achieve the benefit that they sought. The issue on the merits focused on whether ATC's failure to catch respondents' error during the readback should exonerate respondents, or at least mitigate the sanction. The Board's decision recognized that precedent dictated neither result.⁴ In any event, and regardless of whether applicants are deemed to have prevailed, the Administrator was substantially justified in pursuing this case and the sanction assessed in the order. At the time the

³See also Grzybowski v. Administrator, NTSB Order EA-4301 at 3, n.3 (1994), where the Board did not decide the issue because the appeal focused on whether the Administrator had been substantially justified in pursuing the sanction of revocation, rather than whether respondent had prevailed because the Board reduced sanction, and NTSB Order EA-4413 (January 5, 1996), where we reiterated in dicta that "a reduction in sanction standing alone, will not ordinarily support an EAJA award." Id. at 3, n.3.

⁴We recognized that existing precedent supported exoneration only where ATC negligence precipitates the violations, see e.g., Administrator v. Holstein, 6 NTSB 569 (1988). Nevertheless, we reasoned that, because other Board precedent supports the proposition that sanction may be mitigated where ATC deficiencies contribute to a violation, see e.g., Administrator v. Alvord, 1 NTSB 1657 (1972), and in light of very recent Board precedent in which we emphasized the critical importance of pilot readbacks, e.g., Administrator v. Frohmuth and Dworak, NTSB Order EA-3816 (1993), waiver of sanction was justified here. Order EA-4117 at 8.

Administrator ordered the suspension of applicants' certificates and during the subsequent appeal, Board precedent was clear that ATC negligence which neither precipitated nor contributed to an operational error would not excuse a violation or serve as a mitigating factor. Further, the suspensions assessed were consistent with those ordered in the past for similar infractions. In sum, the Administrator's case was neither weak or tenuous. The Administrator simply could not and did not anticipate the Board's novel application of precedent to these facts. The purposes of EAJA would not be served by an award of fees under these circumstances.

ACCORDINGLY, IT IS ORDERED THAT:

The law judge's order denying the EAJA applications is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.